No. 41609-3-II
Cowlitz Co. Cause No. 10-1-00904-1

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

THOMAS DOUGLAS REYNOLDS,

Appellant.

SUPPLEMENTAL BRIEF OF RESPONDENT

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3. The record is adequate to sustain a conviction.

4. There was sufficient evidence to support a conviction.

II. STATEMENT OF THE CASE

The Respondent generally accepts the Appellant's recitation of the facts, with a few additional notes.

Detective Streissguth testified about the procedure the Street Crimes Unit used when evaluating informants. Specifically, he testified that informants give him a list of potential targets. RP 37. He also testified that he draws intelligence in general as part of his role as a detective and compares informant's lists of potential targets with his own information. RP 37. He then agreed that appellant was on the list. RP 38. The defense objected and after the objection, Streissguth agreed that based on the intelligence he'd gathered in the community, he had identified Reynolds as a target and began the investigation. RP 38-39.

The trial court required the State to establish the competency of Mr. Fairman. RP 96. Mr. Fairman testified that he had used heroin at 10:00am on the morning of trial, that he has been using for the last four years, and that he uses approximately $1/10^{th}$ of a gram at a time. RP 96. He also testified that he had used $1/10^{th}$ of a gram that morning, $1/10^{th}$ of a

gram was the necessary amount to keep him from getting sick, and that he did not get "high" from the dosage. RP 97. He also testified that he did not feel like he was under the effects at the time he testified, that he could understand the questions he was asked, and that he did not have any trouble understanding what was happening during his questioning. RP 98. The defense questioned Mr. Fairman briefly about the contract and told the court that the purpose of the questioning was to test his understanding of the past contract. RP 101. The court found that Fairman testified that he took a maintenance dose that day that did not affect his ability to perceive or communicate. RP 102-103.

III. ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ALLOWING MR. FAIRMAN TO TESTIFY

The trial court did not abuse its discretion by allowing Mr. Fairman, the once-confidential informant in this case, to testify. As the appellant points out, the burden to show that a witness is incompetent to testify is on the opposing party. *State v. Watkins*, 71 Wn.App. 164, 169, 857 P.2d 300 (1993). The witness is presumed competent. *State v. S.J.W.*, 170 Wn.2d 92, 100, 239 P.3d 568 (2010). Competency is governed by statute and requires that a person be "of sound mind and discretion." RCW 5.60.020. There are two ways a witness can be incompetent; (1) they are of unsound mind or intoxicated at the time of examination, and (2) they are incapable of receive just impressions of the facts, or of relating those facts truthfully. RCW 5.60.050. The appellant alleges

former, that Mr. Fairman was intoxicated, yet no evidence was produced that Mr. Fairman was intoxicated. To put it another way, while Mr. Fairman may have had heroin in his system, there is nothing to suggest that he was "without comprehension at all," which is essentially what the statute requires. *State v. Hardung*, 161 Wash. 379, 382, 297 P. 167 (1931). To be competent under the statute, the witness must merely be able to understand the nature of the oath and be capable of giving a correct account of what they observed. *McCutcheon v. Brownfield*, 2 Wn.App. 348, 354, 467 P.2d 868 (1970), *citing State v. Moorison*, 43 Wn.2d 23, 259 P.2d 1105 (1953). All of the evidence produced at the trial indicated the Mr. Fairman was aware of the nature of the oath and was able to give an account of the proceedings and the trial court ruled as such.

The evidence elicited by the State showed the Mr. Fairman was competent. The trial court required the State to establish Mr. Fairman's competency, so the State called Mr. Fairman and examined him. Specifically, Fairman was questioned about his usage and he testified that he was not "high," that he had taken a maintenance dose earlier in the day, and that he was able to understand the proceedings. There was no essentially no further evidenced produced. There was NO evidence produced that suggested Mr. Fairman was impaired in any way and all the record reveals is that defense counsel made unsworn personal observations that Mr. Fairman appeared "punchy," had small pupils, and that he

appeared to be under the influence. RP 78. This is not evidence and is not sufficient to overcome the presumption of competency.

The standard is abuse of discretion and there is nothing to suggest the trial court abused its discretion. The trial court was in a position to see, hear, and personally observe Mr. Fairman. The trial court observed first-hand the testimony of Mr. Fairman. The trial court concluded that he was competent. The defense presented no evidence to show that Mr. Fairman was under the influence and unable to testify. The trial court's determination was not an abuse of discretion and should not be disturbed on appeal.

Nor did the trial court cut off defense counsel's cross-examination of Mr. Fairman. There are two possible instances that the appellant could be referencing. The first instance would be at the end of the defense examination of Mr. Fairman during the competency hearing. The court specifically asked defense counsel whether he had any questions about Mr. Fairman's ability to recall or speak? RP 101. When defense counsel said he had no further questions, the trial court then specifically stated, "And if you want to lay your foundation, I guess, for the purposes of appeal, I'll let you continue to ask." RP 101. The defense did not ask any further questions. It strains credulity to think that, given this statement, the trial court in anyway precluded the cross-examination of the witness.

The second potential instance was immediately before Mr. Fairman took the stand to testify to the jury. The appellant refers specifically to the trial court's statement that the court would find that Mr. Fairman had used only a maintenance dose and that it did not affect his ability to perceive or communicate. RP 102. The appellant seems to think that this was a limitation on defense counsel's ability to examine Mr. Fairman, but fails to point out what the judge said immediately before making this statement, which was that "we need to take a side bar or something before we get there because..." RP 102. Nor does the appellant relate the rest of the context, which is that defense counsel had stated that they would only be getting into drug use if it related to his competency to testify. RP 102. Taken together as a whole, the judge is simply saying that he wants a side-bar before the defense inquires into whether Mr. Fairman is competent because he had used drugs that morning. The court had previously ruled that testimony about Mr. Fairman's drug use in any context other than competency was not relevant, since he was forthcoming about his use and did not appear to be related to his ability to be truthful. RP 77.

The trial court did not abuse its discretion by finding Mr. Fairman competent to testify where there was not testimony to suggest that Mr. Fairman was under the influence or that his ability to testify was impaired. Nor did the court limit the defense from eliciting testimony about his drug use in relation to his competency. Where the trial court limited the drug

use based on relevance, it did not abuse its discretion. The trial courts rulings should be affirmed.

B. THE TESTIMONY BY DETECTIVE BRIAN STREISSGUTH ABOUT HIS TARGET LIST DID NOT VIOLATE THE CONFRONTATION CLAUSE

The testimony offered by Detective Streissguth regarding his target list was not hearsay and did not violate the confrontation clause of the Sixth Amendment. There were two specific hearsay objections made that occur on RP 38 and neither instance constitutes testimonial hearsay. Nor do either of those instances implicate confrontation clause protections. The first possible instance has the prosecutor asking "Would it be fair to say, then, that you take the list that he [Mr. Fairman] provides and then you cross-reference that with intelligence you already have?" RP 37. The detective's response was "definitely." RP 37. Defense counsel objected based on hearsay, but that objection was overruled by the trial court. RP 38. The second instance follows immediately and consists of the prosecutor asking, "so that was what ultimately identified in this case. You decided to go after Mr. Reynolds and he was on the list." RP 38. The detective answered, "correct." RP 38. Defense counsel objected based on hearsay and the Sixth Amendment. RP 38. The court allowed the prosecutor to ask a follow up question, which was "based on that intelligence, that's – you identified Mr. Reynolds as the target and that's why you began this investigation." RP 38. The detective answered that this was correct. RP 38.

Neither statement represents hearsay or confrontation clause violations. The same analysis applies to both statements. They both reference "intelligence" that the detective has gathered from working in the community. They are simply is not out-of-court statements offered to prove the truth of their matter, These statements are not attributed to any specific person and were not necessarily based on hearsay statements, since the detective testified they also engage in surveillance. The detective simply testified about the intelligence process and the statements represent no more than background information. Nor does either statement meet the definition of testimonial hearsay, since neither exists as a statement of a declarant, nor do they seem to have been given in the course of an interrogation "to establish or prove past events potentially relevant to later criminal prosecution." *Davis v. Washington*, 547 U.S. 813, 822 (2006).

Even if there was a confrontation clause error, it would be harmless. Confrontation clause errors may be harmless. *State v. Davis*, 154 Wn.2d 291, 304, 111 P.3d 844 (2005). The relevant question would be whether there was overwhelming untainted evidence and if so, the error would be harmless. *Id.* at 305, *citing State v. Smith*, 148 Wn.2d 122, 139, 59 P.3d 74 (2002). As the court in *Powell* observed, if there is no "reasonable probability that the outcome of the trial would have been different had the error not occurred," the error would be harmless. *State v. Powell*, 126 Wn.2d 244, 267, 893 P.2d 615 (1995).

The two statements likely had no effect on the outcome. The entirety of the statement was that Detective Streissguth had cross-referenced Mr. Fairman's statement that he could buy drugs from the appellant against information he gathered as part of his own intelligence gathering and that the appellant was "on the list." The rest of the untainted evidence in the trial consisted of the testifying witness saying that he went into the home of the appellant and purchased drugs from him, the appellant's girlfriend confirming that Fairman went into the home and purchased drugs, the appellant's girlfriend claiming that she was the one who sold the drugs and that the appellant was not involved, and an audio recording of the transaction that featured the voices of Fairman, the appellant, and the appellant's girlfriend. The admission of the statement, in light of the rest of the untainted evidence, did not, in all likelihood, change the result of the trial. Any error from the admission of that statement was harmless and the verdict should not be disturbed.

C. THERE IS A SUFFICIENT RECORD TO SUPPORT REVIEW

There is a sufficient record to support review. The appellate court and appellant's counsel have the same access to the evidence as the jury did. The wire recording was admitted into evidence. The appellant's entire argument is that the transcript of the wire recordings has too many notations of "inaudible," yet the appellant's counsel admits in the brief that he listened to the actual audio recording of the wire that was played for the jury. No transcript was presented to the jury at trial. Appellant's

counsel actually had better access to the evidence than the jury did because he actually possessed the CD that contained the wire recordings and presumably listened to them more than once. The CD was admitted as evidence during the trial and the wire recording has been reviewed. There is no additional record that could satisfy the appellant's demands. Under the standard suggested by the appellant, there would **never** be an adequate record for appeal if a wire recording was used.

D. THERE IS SUFFICIENT EVIDENCE TO SUSTAIN THE CONVICTION

There is sufficient evidence to sustain the conviction. As the appellant noted, if the court finds that when considering the evidence in the light most favorable to the State, **any** rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, the jury's finding of guilt should not be set aside. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The burden is set intentionally low, as the verdict of the jury enjoys great deference. It should not be disturbed in this case.

There was testimony from the informant that the appellant sold him drugs, which is by itself sufficient to prove the essential elements of the crime charged. Mr. Fairman testified that he purchased narcotics from the appellant, specifically that the appellant was on the once who handed him the narcotics. RP 111. The detectives searched him before he went into the appellant's house and no drugs were found. When he came out of the appellant's residence he had narcotics, and none of the pre-issued buy

money. Moreover, the appellant's girlfriend admitted that she sold drugs to Mr. Fairman, but testified that Mr. Fairman had nothing to do with the transaction. RP 168. A reasonable trier of fact could have believed the testimony of Mr. Fairman and the State's other witnesses. A reasonable trier of fact could have believed that the appellant's girlfriend, who had already plead guilty and been sentenced for her participation, was trying to protect the appellant. RP 171. A reasonable trier of fact could have found the appellant guilty of delivery of a controlled substance based on the evidence and inferences available. The jury's verdict should not be set aside.

IV. CONCLUSION

The trial court properly allowed Mr. Fairman to testify. The court, based on Mr. Fairman's testimony and its own observations found that he was competent. There was no evidence produced that Mr. Fairman was intoxicated. The court did not abuse its discretion by allowing him to testify.

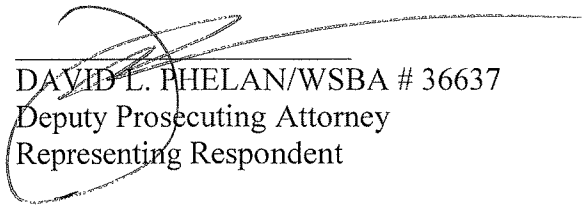
The statements the court allowed by Detective Streissguth were neither hearsay or testimonial in nature. They were not offered to prove the truth of their matter and consisted of the detective explaining his intelligence gathering techniques and that the appellant was not simply a random choice. Even if they were testimonial, their admission was harmless given the testimony by the informant that the appellant put the drugs in his hands.

There was a sufficient record to allow for review and the record supports the jury's verdict. Appellate counsel was able to review the audio CD, which was admitted as an exhibit at trial, as well as a transcript. There is a sufficient record for review. That record shows that the informant testified the appellant put the drugs in his hand, that the appellant's girlfriend was involved in the sale of the drugs and corroborated the informant's statements about being present in the house. A reasonable jury, drawing all inferences and conclusions in favor of the State, could have believed Mr. Fairman and found that the appellant sold him narcotics, or was at the least an accomplice. The jury's verdict is given great deference and it should not be disturbed here.

Respectfully submitted this 30th day of November, 2011.

SUSAN I. BAUR
Prosecuting Attorney

By:



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APPENDIX

RCW 5.60.020
Who may testify.

Every person of sound mind and discretion, except as hereinafter provided, may be a witness in any action, or proceeding.

RCW 5.60.050
Who are incompetent.

The following persons shall not be competent to testify:

(1) Those who are of unsound mind, or intoxicated at the time of their production for examination, and

(2) Those who appear incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly.

COWLITZ COUNTY PROSECUTOR

November 30, 2011 - 9:54 AM

Transmittal Letter

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